Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1824

FLEMING S. JACKSON,
Plaintiff-Appellant,

vs.

STONE & SIMON ADVERTISING, INC., et al.,
Defendants-Appellees.

BRIEF IN OPPOSITION TO DEFENDANTS-APPELLEES' MOTION TO DISMISS

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I

DEFENDANTS-APPELLEES' ALLEGATIONS

(1) In their Motion to Dismiss the Defendants-Appellees allege as follows:

(i) That this appeal is "a direct appeal from an Order of the Sixth Circuit Court of Appeals;"

(ii) That "the Sixth Circuit Court of Appeals affirmed the judgments of the District Court" which were entered

in this action on August 29, 1975, September 26, 1975 and October 1, 1975; and

(iii) That it is obvious from a review of the Questions Presented by the Appeal that such appeal "is not based upon a holding that an act of Congress is unconstitutional."

(2) Such allegations are without foundation in law or fact.

(3) It is clear from (i) the record and (ii) the facts set forth in Plaintiff-Appellant's Jurisdictional Statement at (1) page 17, paragraph 1 and (2) pages 32 through 36, paragraphs 31 through 48, as follows:

(a) That this appeal is an appeal from a final Order of the United States District Court for the Eastern District of Michigan Southern Division denying Plaintiff-Appellant's MOTION TO REVERSE AND/OR SET ASIDE AND/OR VACATE VOID JUDGMENTS; and

(b) That the Sixth Circuit Court of Appeals **did not** affirm the judgments of the District Court which were entered in this action on August 29, 1975, September 26, 1975 and October 1, 1975. (See: (App. Q p. 33); (App. UU p. 111); (App. VV p. 13); (App. WW p. 113); (App. XX p. 114); and (App. XV p. 141).)

II

BASIS OF DISTRICT COURT'S JUDGMENTS

(1) The Court (1) granted the Defendants summary judgment (2) entered judgments (i) dismissing the actions and (ii) awarding the Defendants attorney's fees and costs. The Court bottomed its decision on an agreement between Plaintiff and Broadcast Music, Incorporated (hereinafter BMI). (App. KK p. 91)

(2) Said agreement grants to BMI the exclusive right to perform "and to license others to perform" Plaintiff's said copyrighted work, as a musical composition.

(3) Said agreement (i) is not an integrated part of this lawsuit and (ii) was brought forth by the Defendants in a motion for summary judgment. The Defendants alleged in such motion that, based on said agreement between Plaintiff and BMI, "Plaintiff has no standing to sue" for alleged infringement of copyright to said work. The Court ruled that said agreement between Plaintiff and BMI is a "complete bar" against infringement of copyright to said work. (App. N p. 26)

(4) None of the Defendants are parties to said agreement. Plaintiff, Fleming S. Jackson, is the promisor and BMI is the promisee to said agreement. However, *the Court ruled that the Defendants are parties to said agreement "indirectly" and "beneficaries of it."* (App. K p. 21)

(5) *All of the parties to this action are citizens of the State of Michigan. BMI is (1) not a party to this lawsuit* and (2) a foreign corporation whose headquarters now is, and since the commencement of this lawsuit, has been, located in the City and State of New York. *BMI (i) is not a citizen of Michigan* (ii) does not have a principal place of business in the State of Michigan (iii) has not had service of process in this action (iv) has not filed a motion to intervene in this action and (v) has not been brought in this action as a third party Plaintiff or Defendant. (App. KK p. 91)

(6) The subject-matter of said Defendants' Motion for Summary Judgment and Award of Attorney's Fees is said agreement between Plaintiff and BMI. The terms of said agreement dictates that such agreement (1) is governed pursuant to the laws of the State of New York (2) shall be submitted to arbitration, prior to litigation of any disputes "arising out of the perform-

ance thereof or based on the breach thereof" and (3) "shall be submitted to arbitration in the City, County and State of New York." (App. KK p. 91)

(7) In its Order Denying Plaintiff's Motion to Reverse and/or Set Aside and/or Vacate Void Judgments, entered August 31, 1976, the Court ruled Plaintiff's said Motion was "untimely, not having been filed within twenty (20) days after judgment; and further ordered that said motion be denied on the merits since it presents no new issues." On August 31, 1976 the Court also entered in this action Order Vacating Notice of Hearing of said motion. (App. A p. 1)

III

INVALIDATION OF FEDERAL STATUTES, ACTS OF CONGRESS AND FEDERAL RULES OF CIVIL PROCEDURE

(1) The record shows that (i) the district court sustained Defendants-Appellees' motions for summary judgment dismissal and entered judgments dismissing Civil Action Nos. 39071 through 39074 and 74-70900.

(2) In such moving papers the Defendants-Appellees alleged as follows:

> (i) That said agreement between Plaintiff-Appellant and BMI is a *complete bar against the claims of alleged infringement* set forth in the Complaints of this action. (i.e. Civil Action Nos. 39071 through 39074);
>
> (ii) That such said Complaints fail to state a claim upon which relief can be granted; and
>
> (iii) Plaintiff has *no standing to sue* for alleged infringement of his musical composition entitled "Merry Christmas

> to You." (App. R p. 34); (App. P p. 30); (App. N p. 26); (App. K p. 21); (App. E p. 9); (App. H p. 15); (App. I p. 17)

(3) In so holding it appears that such rulings by the Court (1) "restrict, limit and modify substantive rights" (2) extend or restrict jurisdiction conferred by a statute and (3) declare in whole or in part unconstitutional and/or invalid and/or void (i) Acts of Congress; (ii) and/or federal statutes; and/or federal rules of civil procedure. *United States v. Raines*, 362 US 17 (1962); *Fleming v. Rhodes*, 331 US 100, (1946).

(4) It appears that by (1) granting Defendants summary judgment (2) dismissing said actions bottomed on said agreement and (3) entering ORDER DENYING PLAINTIFF'S MOTION TO REVERSE AND/OR SET ASIDE AND/OR VACATE VOID JUDGMENTS the Court has (i) repudiated jurisdiction of the claims "at law" set forth in the Complaints; *Ex parte Simon*, 247 US 231, 38 S Ct 497, 62 L Ed 912 (1924); (ii) issued an injunction against such claims; *Ettelson v. Metropolitan Insurance Co.*, 317 US 188, 63 S Ct 163, 87 L Ed 176 (1942); (iii) denied the parties to said actions a jury trial as declared by the seventh amendment of the Constitution of the United States; *Dimick v. Schiedt*, 293 US 474, 487 (1934); *Black v. Boyd*, 248 F2d 156 (CA 6, 1957); *Arnstein v. Porter*, 154 F2d 464 (CA 2, 1962) and (iv) denied due process to the parties in this action. *Windsor v. McVeigh*, 93 US 274, 278, 283-284 (1876); *Hovey v. Elliott*, 167 US 409, 414-415 (1897).

(5) *In sustaining Defendants motion in bar, it appears that the Court applied laws and/or statutes appropriate in criminal proceedings.* In such proceedings a motion in bar "if sustained ends the prosecution and exculpates the defendant." "It is distinguished from motions attacking the indictment. The motion in bar is thus a defense to the indictment rather than a challenge to it." *United States v. Weller* (1971), 401 US 254, 91 S Ct

602, 28 L Ed2d 26. However, *it appears to be well settled that the application of such principles of law in civil proceedings regarding copyrights has no force or effect. This Court has consistently held that a copyright is a creature of statute and must be strictly construed. Wheaton v. Peters,* 8 Pet. 590; *Banks v. Manchester,* 128 US 244, 253; *Thompson v. Hubbard,* 131 US 123, 151; *American Tobacco Company v. Werckmeister,* 207 US 284; *White-Smith Music Co. v. Apollo Co.,* 209 US 1 (1907).

Title 17 USC—Act of July 30, 1947 and 28 USC §§ 1331; 1332; 1338(a); 1400; 1441; 2072— Act of June 19, 1934

(6) The Complaints of this action i.e. Civil Action Nos. 39071 through 39074 allege that (i) this is an action of statutory infringement of copyright for damages only (ii) federal district court has jurisdiction of such action pursuant to 28 USC § 1338(a); and (iii) Plaintiff has complied with the Act of July 30, 1947, and all other laws governing copyrights and secured the exclusive rights and privileges in and to copyright to the musical composition entitled Merry Christmas to You, and received from the register of copyrights a certificate of Registration. (App. S pp. 35, 36) (App. VI p. 118).

(7) Title 17 USC, "Copyrights" was enacted into positive law July 30, 1947 and as such it is prima facie evidence of all the positive statutory law on the subject. *By holding that said agreement is a complete bar against infringement by Defendants, it appears that the Court by rule has (i) limited or extended jurisdiction of and (ii) declared, in whole or in part, unconstitutional and/or invalid and/or void Act of July 30, 1947* and/or Title 17 USC; and 28 USC §§ 1331; 1332; 1338(a); 1400; 1441; 2072 and/or Act of June 19, 1934 and (ii) *created vested rights under said agreement which "serve to*

restrict and limit an exercise of a constitutional power of Congress." Fleming v. Rhodes, 331 US 100, 107 (1946); *Guaranty Trust Co. v. Henwood,* 307 US 247, 258, 259 (1939); *Norman v. Baltimore & O. R. Co.,* 294 US 240, 306-311; Rule 82 FRCP; *Sibbach v. Wilson & Co.,* 312 US 1, (1940).

(8) It appears that the prescription of the rules by the district court "abridge enlarge or modify substantive rights" and such prescription is subject to the prohibition of the Enabling Act. *Sibbach v. Wilson & Co., supra.*

Rule 60(b) Federal Rules of Civil Procedure

(9) The Court (1) based its ORDER DENYING PLAINTIFF'S MOTION TO REVERSE AND/OR SET ASIDE AND/OR VACATE VOID JUDGMENTS on Rule IX-A, Rules of U.S. District Court E.D. Michigan, S.D. (App. A p. 1); (2) denied such motion as "untimely, not having been filed within twenty (20) days after judgment was entered and (3) entered ORDER VACATING NOTICE OF HEARING of said motion, at which time the Court held that said motion "is an untimely motion for rehearing and the Rule IX-A, U.S. District Court E.D. Michigan, provides that there shall be no oral argument on motion for rehearing." (App. III p. 116). It appears from the record that (1) the judgments entered in this lawsuit are absolutely void (2) such motion is (i) timely and (ii) not a motion for rehearing and (3) such motion was brought pursuant to Rule 60(b) FRCP. Vol. 7, J. Moore, *Federal Practice,* par. 60.25 [2], at 300, 301 (2d ed, 1973).

Rule 38(a) Federal Rules of Civil Procedure

(10) The record shows that Plaintiff-Appellant's motion for jury trial filed November 5, 1974 in Civil Action Nos. 39071 through 39074 was timely. *Black v. Boyd,* 248 F2d 156, *supra.* (App. X p. 69); (App. QQ p. 105); (App. V p. 61)

(11) In its ORDER DENYING MOTION FOR JURY TRIAL in Civil Action Nos. 39071 through 39074 held that "Rule 38(b) of the Federal Rules of Civil Procedure requires that a demand for a jury trial be served not later than ten (10) days after the service of the last pleading directed to such issues." Failure to do so constitutes a waiver of a jury trial. Federal Rule of Civil Procedure 38(d). (App. QQ p. 105); (App. X p. 69)

(12) It appears from the record that (i) no trial has been held in said actions; (ii) the parties in this action are entitled to a trial as a matter of right, *Arnstein v. Porter, supra; Black v. Boyd, supra; Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 82 S Ct 894, 8 L Ed2d 44 (1962); and (iii) in its prescription of (1) Rules 4; 6(b) 8(a)(1); 13(a); 13(b); 15(b); 15(c); 17(a); 24; 38(a); 38(b); 38(d); 39(a); 39(b); 56; 59(e); 60(b); 82; Federal Rules of Civil Procedure; and (2) Rules IX-A; IX(j), Rules of U.S. District Court E.D. Michigan, S.D. the Court abridged, enlarged or modified substantive rights of the parties of this action (i.e. denied such parties due process; and a jury trial as declared by the Seventh Amendment of the Constitution of the United States of America).

IV

DEFENDANTS-APPELLEES' MOTION IS UNTIMELY

(1) The record shows that (i) Defendants-Appellees were served by mail three (3) copies of Plaintiff-Appellants' JURISDICTIONAL STATEMENT on June 21, 1977; and (ii) Defendants-Appellees were served on July 1, 1977 by hand, form CO-75, designating the case number and date that this appeal was docketed and form CO-73, an Appearance Form.

(2) Defendants-Appellees' Certificate of Mailing on page 3 of said motion, is as follows:

> "This is to certify that a copy of the foregoing MOTION TO DISMISS and BRIEF were mailed, postage prepaid, to Plaintiff-Appellant Fleming S. Jackson, at 5061 Dailey, Detroit, Michigan 48204, this 29th day of July, 1977.
>
> /s/ Raymond E. Scott"

(3) It appears that the record shows that copies of such motion were picked up from Interstate Brief & Record Co., 1615 Abbott St., Detroit, Michigan 48216 by United Parcel on or about August 16, 1977.

(4) The records of United Parcel show that copies of such motion was delivered to Plaintiff-Appellant on August 17, 1977.

(5) It appears from the Proof of Service filed by Interstate Brief & Record Co. that the aforesaid dates are true and correct.

(6) In view of the foregoing it appears that Defendants-Appellees' MOTION TO DISMISS is untimely, pursuant to Rule 16, Rules of the Supreme Court of the United States.

CONCLUSION

It appears from the foregoing as follows:

(i) That this appeal is a direct appeal from a final Order of the United States District Court for the Eastern District of Michigan, Southern Division, denying PLAINTIFF'S MOTION TO REVERSE AND/OR SET ASIDE AND/OR VACATE VOID JUDGMENTS;

(ii) That the Sixth Circuit Court of Appeals *did not* affirm the judgments entered in Civil Action Nos. 39071 through 39074 and removed Civil Action No. 74-70900 on August 29, 1975, September 26, 1975 and October 1, 1975.

(iii) That this appeal is an appeal based upon a holding that, in its prescription of the Fderal Rules of Civil Procedure to particular facts, the district court by its rule (1) "restrict, limit and modify substantive rights" (2) extend or restrict jurisdiction conferred by a statute and (3) declared in whole or in part unconstitutional and/or invalid and/or void (i) Acts of Congress; (ii) and/or federal statutes; and/or federal and local rules of procedure.

(iv) That Defendants-Appellees' MOTION TO DISMISS is (1) untimely and (2) without foundation in law or fact.

WHEREFORE Plaintiff-Appellant respectfully requests that Defendants-Appellees' said Motion be denied.

Respectfully submitted,

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